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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 BRUCE EKLUND, an individual,

10 Plaintiff,

11 v.

12 THE CITY OF SEATTLE, et al.,

13 Defendants.

C06-1815Z

ORDER

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15 THIS MATTER comes before the Court on Defendant Bonner's Post-Trial Motion  
16 for Judgment as a Matter of Law, docket no. 312 (Praecipe, docket no. 340-2). Having  
17 considered the pleadings and declarations filed in support of and in opposition to the motion,  
18 the Court GRANTS IN PART and DENIES IN PART Defendant Bonner's Post-Trial  
19 Motion for Judgment as a Matter of Law, docket no. 312.

20 **A. Fed. R. Civ. P. 50(a) and (b)**

21 Fed. R. Civ. P. 50(a)(1) permits a court to resolve an issue against a party and enter  
22 judgment as a matter of law ("JMOL") against the party before the issue is submitted to the  
23 jury where "a party has been fully heard on an issue during a jury trial and the court finds  
24 that a reasonable jury would not have a legally sufficient evidentiary basis to find for the  
25 party on that issue." Fed. R. Civ. P. 50(a)(2) requires the movant for JMOL to "specify the  
26 judgment sought and the law and facts that entitle the movant to the judgment." When

1 considering a Fed. R. Civ. P. 50(a) motion, the Court applies a summary judgment standard,  
2 inquiring “whether the evidence presents a sufficient disagreement to require submission to a  
3 jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson  
4 v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Fed. R. Civ. P. 50(b) provides that “[i]f  
5 the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the  
6 court is considered to have submitted the action to the jury subject to the court’s later  
7 deciding the legal questions raised by the motion.” In ruling on a renewed motion for JMOL  
8 filed after entry of judgment, “the court may: (1) allow judgment on the verdict, if the jury  
9 returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of  
10 law.” Fed. R. Civ. P. 50(b).

11 **B. Defendants’ JMOL Motions**

12 At the close of evidence on March 18, 2009, Defendants made an oral motion for  
13 JMOL, seeking to dismiss Plaintiff Bruce Eklund’s 42 U.S.C. § 1983 (“Section 1983”)  
14 procedural due process claim against the individual defendants (including Defendant Judge  
15 Fred Bonner) based, in part, on the affirmative defense of qualified immunity. Olsen Decl.,  
16 docket no. 313 (Praecipe, docket no. 330-3), Ex. A (Verbatim Report of Proceedings “VRP”)  
17 at 1456-58. The Court denied the motion. Id., Ex. A (VRP) at 1458. The jury subsequently  
18 rendered a verdict for all defendants, except Bonner, on Eklund’s procedural due process  
19 claim. Jury Verdict, docket no. 301, at 2. The jury awarded Eklund \$210,000 in economic  
20 damages, \$100,000 in non-economic damages, and \$150,000 in punitive damages against  
21 Bonner. Id. at 3. The Court entered a Judgment in accordance with the jury verdict.  
22 Judgment, docket no. 308.

23 Bonner now moves pursuant to Fed. R. Civ. P. 50(b) for JMOL or, in the alternative, a  
24 new trial, on Eklund’s procedural due process claim, arguing that Bonner has qualified  
25 immunity, that there was insufficient evidence of a lack of due process presented at trial, and  
26 that the damage awards are unsupported by the law and evidence of the case. Defendants’

1 Fed. R. Civ. P. 50(a) motion at trial preserved Bonner’s right to now bring a renewed motion  
2 for JMOL on Eklund’s procedural due process claim. See Reeves v. Teuscher, 881 F.2d  
3 1495, 1498 (9th Cir. 1989) (“Fed. R. Civ. P. 50(b) may be satisfied by an ambiguous or  
4 inartfully made motion for a directed verdict . . .”).

5 **C. Substantial Evidence Standard**

6 The Court reviews Bonner’s challenges to the sufficiency of the evidence supporting  
7 the jury verdict under a “substantial evidence” standard, which requires the Court to  
8 determine “whether the evidence, construed in the light most favorable to the nonmoving  
9 party, permits only one reasonable conclusion, and that conclusion is contrary to that of the  
10 jury.” Bains LLC v. Arco Products Co., 405 F.3d 764, 774 (9th Cir. 2005) (internal  
11 quotations and citations omitted) (reviewing evidence supporting punitive damages).  
12 “Substantial evidence means such relevant evidence as a reasonable mind might accept as  
13 adequate to support a conclusion.” Fisher v. City of San Jose, 558 F.3d 1069, 1074 (9th Cir.  
14 2009) (internal quotations and citations omitted). “In making this determination, [a court]  
15 must take care not to substitute [its] view of the evidence for that of the jury.” Id.

16 **D. Qualified Immunity**

17 Bonner argues that he is entitled to qualified immunity because a reasonable person in  
18 Bonner’s position would not have known that he should have recused himself on the basis of  
19 Eklund’s threat to publicize his theories of wrongdoing by Magistrate Judges of the Seattle  
20 Municipal Court (“SMC”). The Court must determine whether Eklund has shown that  
21 Bonner violated a clearly established constitutional right of which a reasonable person would  
22 have known. See Pearson v. Callahan, 555 U.S. ----, 129 S. Ct. 808, 815-16 (2009) (allowing  
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1 a flexible approach to the two-prong test set forth in Saucier v. Katz, 533 U.S. 194 (2001)<sup>1</sup>;  
2 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

3 Bonner first argues that he afforded Eklund with the requisite due process – i.e., he  
4 provided notice of the charges against Eklund; he explained the employer’s evidence against  
5 Eklund; and he provided Eklund an opportunity to respond in person. See Brewster v. Bd. of  
6 Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 986 (9th Cir. 1998). Although Eklund  
7 does not dispute these facts, Eklund’s pre-termination hearing violated Eklund’s procedural  
8 due process rights not because of Bonner’s conduct at the hearing per se but because of  
9 Bonner’s refusal to recuse himself from presiding over Eklund’s pre-termination hearing.  
10 Eklund argued to the jury that Bonner, as Presiding Judge of the SMC, was biased as a result  
11 of Eklund’s accusations of illegal behavior by the SMC Magistrate Judges. The jury verdict  
12 against Bonner on Eklund’s procedural due process claim shows that the jury found Bonner  
13 to be biased.

14 Bonner argues that he upheld, rather than violated, Eklund’s due process rights by  
15 giving Eklund an opportunity to clear his name before Bonner, who was the ultimate  
16 decision-maker regarding Eklund’s termination. A meaningful opportunity to be heard  
17 typically encompasses the right to confront one’s decision-maker. And “[f]airness and  
18 accuracy are not always threatened simply because the hearing examiner is the supervisor of  
19 an employee.” Arnett v. Kennedy, 416 U.S. 134, 199 (1974). In the present case, however,  
20 where Eklund requested an impartial decision-maker and asserted in writing that Bonner  
21 could not be impartial at the pre-termination hearing, see Trial Exhibit 74 (July 12, 2004

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24 <sup>1</sup> Under Saucier v. Katz, “the first inquiry is whether ‘[t]aken in the light most favorable to the  
25 party asserting the injury, do the facts alleged show the [official’s] conduct violated a  
26 constitutional right?’ If the answer to the first inquiry is yes, the second inquiry is whether the  
right was clearly established: in other words, ‘whether it would be clear to a reasonable officer  
that his conduct was unlawful in the situation he confronted.’” Millender v. County of Los  
Angeles, 564 F.3d 1143, 1148 (9th Cir. 2009) (quoting Saucier, 533 U.S. at 201-02).

Memorandum), it was clear that a meaningful opportunity to be heard from Eklund's point of view would require another impartial hearing officer.

The constitutional due process right to an unbiased hearing is clearly established. See Withrow v. Larkin, 421 U.S. 35, 47 (1975) ("a biased decisionmaker [is] constitutionally unacceptable"); Arnett, 416 U.S. at 197-99 ("the right to an impartial decision-maker is required by due process"). It is also clearly established that a decision-maker's bias can result from the actions of the person before him. In Withrow, the U.S. Supreme Court stated that "the probability of actual bias on the part of the . . . decisionmaker is too high to be constitutionally tolerable" where, for example, "the adjudicator . . . has been the target of . . . criticism from the party before him." Withrow, 421 U.S. at 47. In Arnett, the hearing official was the object of slander that was the basis for the employee's proposed discharge, and thus the hearing official's own reputation was at stake in the pre-termination hearing. Arnett, 416 U.S. at 199.<sup>2</sup> Bonner should have known that Eklund's accusations created a conflict of interest such that Bonner should have recused himself from presiding over Eklund's pre-termination hearing. Eklund expressly requested another impartial decision-maker; Bonner viewed Eklund's request and accusation as a "thinly veiled threat." Bonner violated Eklund's clearly established constitutional right to have an unbiased decision-maker preside over his pre-termination hearing. The Court denies Bonner's motion for JMOL on qualified immunity grounds.

#### **E. Evidence of Bias**

Bonner argues that Eklund presented insufficient evidence of a constitutional violation because Bonner provided Eklund with due process when he presided over Eklund's hearing

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<sup>2</sup> The Court has reviewed Bonner's Supplemental Authority, docket no. 377, and Eklund's Reply thereto, docket no. 378. In Tibbetts v. Kulongoski, No. 07-36067, 2009 WL 1492156 at \*10 (9th Cir. May 29, 2009), the Ninth Circuit acknowledged that "cases need not be 'fundamentally similar' in order to put an official on notice that his conduct violates established law," citing Hope v. Pelzer, 536 U.S. 730, 741 (2002). The Ninth Circuit noted that "the parameters of the right" need to be "clearly established by case law." Tibbetts at \*10. Tibbetts does not undermine the case law cited by Eklund.

1 and included Eklund's version of the facts in all the later documentation regarding  
2 termination. Again, this misses the point. The constitutional deficiency was not Bonner's  
3 conduct at the hearing, per se, but rather his bias. Although there was no evidence that  
4 Bonner had any personal animosity toward Eklund, there was sufficient evidence for the jury  
5 to find that Bonner was biased against Eklund as a result of Eklund's accusations against the  
6 SMC. See, e.g., Stockmeyer Decl., docket no. 353, Ex. A (VRP) at 132-136, 189, 601-603,  
7 661, 676, 683, 819-820, 860-861; Trial Exs. 74, 84, 96, 98, 99. It is not the Court's role to  
8 substitute its view of the evidence for the jury's view. The Court denies Bonner's motion for  
9 JMOL on the grounds that there was insufficient evidence of bias at trial.

10 **F. Damages Awards**

11 Bonner moves to vacate the Court's Judgment awarding economic, non-economic,  
12 and punitive damages on Eklund's Section 1983 procedural due process claim. A prevailing  
13 plaintiff on a Section 1983 claim for a violation of procedural due process is entitled to  
14 "nominal damages without proof of actual injury." Carey v. Piphus, 435 U.S. 247, 266  
15 (1978). "Substantial damages should be awarded only to compensate actual injury, or, in the  
16 case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."  
17 Id. "[I]t is not reasonable to assume that every departure from procedural due process, no  
18 matter what the circumstances or how minor, inherently is . . . likely to cause distress." Id. at  
19 263. In allowing a procedural due process claim to go forward in the absence of any proof of  
20 damages, the Ninth Circuit has stated: "A procedural due process claim, unlike negligence  
21 and takings claims, is not rooted in the notions of adequate compensation and economic  
22 restitution but is based on something more – an expectation that the system is fair and has  
23 provided an adequate forum for the aggrieved to air his grievance." Weinberg v. Whatcom  
24 County, 241 F.3d 746, 752 (9th Cir. 2001). Accordingly, the Court requires "proof of actual  
25 injury" to support Eklund's damages awards.

1                   **1.     Economic Damages**

2           Jury Instruction No. 16 provided that it was plaintiff’s burden to prove “[t]he amount  
3 of damages caused by the failure to provide adequate due process.” Jury Instruction No. 17  
4 instructed the jury that it may award economic damages on Eklund’s procedural due process  
5 claim for “[t]he reasonable value of lost past earnings and fringe benefits, from the date of  
6 the termination to the present date” and “the reasonable value of lost future earnings and  
7 fringe benefits.” Courts presume that juries follow the jury instructions. Richardson v.  
8 Marsh, 481 U.S. 200, 211 (1987).

9           Bonner presents two arguments challenging the award of \$210,000 in economic  
10 damages on Eklund’s procedural due process claim. First, Bonner argues that Eklund is not  
11 entitled to economic damages because Eklund’s economic damages flow from his  
12 termination, pursuant to Jury Instruction No. 17, and his termination was justified.  
13 Bonner’s argument is premised on the assumption that the jury verdict in favor of Bonner  
14 and the City of Seattle on Eklund’s wrongful termination claim demonstrates that Eklund’s  
15 termination was justified.

16           In support of his argument that Eklund should receive no economic damages, Bonner  
17 relies on a Ninth Circuit procedural due process case involving a male high school teacher  
18 who was terminated at the midpoint of his one-year contract without a pre-termination  
19 hearing. Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773, 775 (9th Cir. 1982).<sup>3</sup> The  
20 teacher in Vanelli was dismissed based on charges of offensive conduct towards female  
21 students. Id. at 776. The Ninth Circuit held that, under the circumstances of the case, a pre-  
22 termination hearing was constitutionally required. Id. at 778-79. Although the teacher did  
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24           <sup>3</sup> Carey v. Piphus, the leading U.S. Supreme Court case on damages for procedural due process  
25 violations, only discusses mental and emotional distress damages as compensable under Section  
26 1983, and does not discuss economic damages. 435 U.S. at 257-64. This may stem from the fact  
that the case involves the deprivation of procedural due process in connection with the  
suspensions of two students from public elementary and secondary schools, not the termination  
of an employee from gainful employment. See id. at 248.

1 not receive a pre-termination hearing, the teacher received a post-termination hearing that  
2 met the standards of fairness required by the due process clause. Id. at 780. As a result, the  
3 Ninth Circuit upheld “the validity of the subsequent dismissal action.” Id. at 780. The Ninth  
4 Circuit remanded the case to the District Court for a redetermination of compensatory  
5 damages and ordered the District Court to “subtract the \$1,700 awarded appellant for lost  
6 employment benefits, because, although the procedures were deficient, the termination itself  
7 was justified.” Id. at 781.<sup>4</sup> Similarly, in a subsequent case, the Ninth Circuit held that a  
8 finding that an employee would have been fired regardless of the denial of procedural due  
9 process “precludes an award of damages for deprivation of the employment itself.” Merritt  
10 v. Mackey, 932 F.2d 1317, 1323 (9th Cir. 1991); see also Patterson v. City of Utica, 370 F.3d  
11 322, 338 (2d Cir. 2004) (holding that no lost wages should be awarded if the plaintiff would  
12 have been terminated regardless of whether or not he received a name-clearing hearing).

13 Under Vanelli, Merritt, and Patterson, no economic damages are available to a  
14 prevailing plaintiff on a Section 1983 procedural due process claim where the termination  
15 was justified. The pro-defense verdict on Eklund’s wrongful termination claim shows that  
16 Eklund’s termination was justified. There was substantial evidence that Eklund allowed his  
17 parking tickets to be fixed and that Eklund made his accusations against the SMC only after  
18 he was notified of his possible termination for ticket-fixing. Eklund has failed to  
19 demonstrate under any theory that his termination was not justified. Accordingly, the Court  
20 grants Bonner’s motion for JMOL as to economic damages because economic damages  
21 flowing from the termination are unavailable to Eklund, whose termination was justified.

22 In the alternative, Bonner moves to vacate the economic damages award based on a  
23 complete lack of proof of causation, i.e., that Bonner’s bias caused any economic damages.

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25 <sup>4</sup> “Lost employment benefits” included “lost wages and benefits.” Vanelli v. Reynolds Sch.  
26 Dist., No. 76-1008LE, slip op. at 2 (D. Or. Jan. 6, 1983) (on remand).



1 Eklund's brief in opposition to Bonner's motion addresses this issue in one sentence:  
2 "Eklund testified that his job loss and being branded as a ticket fixer caused substantial  
3 economic loss, emotional distress, and reputation harm; people he valued shunned him."  
4 Pl.'s Opp'n, docket no. 352, at 16 (citing Stockmeyer Decl., Ex. A (VRP) at 340-59, 365-  
5 96)(emphasis added). The transcript relied upon by Eklund contains Eklund's testimony  
6 about his employment history prior to and after his employment at the SMC, and his  
7 methodology for calculating his economic loss, but it does not contain any testimony that the  
8 denial of due process, i.e., Bonner's bias, caused any economic loss. Moreover, Eklund has  
9 cited no evidence of anyone who refused to hire him because of his "being branded as a  
10 ticket fixer." Accordingly, the Court grants Bonner's motion for JMOL to vacate the  
11 economic damages award on this alternative basis.

## 12 **2. Non-Economic (i.e., Mental and Emotional Distress) Damages**

13 Bonner argues that the record contains insufficient evidence of non-economic (i.e.,  
14 mental and emotional distress) damages caused by the denial of due process. The Court  
15 defers to the jury on this issue because there was substantial evidence presented at trial that  
16 Eklund suffered mental and emotional distress as a result of the lack of a pre-termination  
17 name-clearing hearing before an unbiased decision-maker. The Court denies Bonner's  
18 motion for JMOL as to the award of non-economic damages.

## 19 **3. Punitive Damages**

20 Bonner moves to vacate the award of punitive damages on several grounds. Bonner  
21 argues that Eklund's claim for punitive damages should not have been presented to the jury  
22 because Eklund failed to properly plead for such relief. Bonner also argues that the Court  
23 should vacate the punitive damages award because the award was not supported by the  
24 evidence.

1 (a) Pleading Punitive Damages

2 It is undisputed that Eklund failed to expressly seek relief for punitive damages in any  
3 of his successive complaints. See Compl., docket no. 1; First Am. Compl., docket no. 6;  
4 Second Am. Compl., docket no. 11; see also Proposed Third Am. Compl., docket no. 85.<sup>5</sup>  
5 Bonner argues that the failure to request punitive damages in a prayer for relief is a factor in  
6 refusing to award such damages. See Hammond v. County of Madera, 859 F.2d 797, 803 n.2  
7 (9th Cir. 1988). In Hammond, the Ninth Circuit declined to direct the District Court to award  
8 punitive damages for a Section 1983 claim on remand because, in part, the plaintiffs had  
9 “failed to request punitive damages in the prayer for relief of their amended complaint and  
10 the issue was not addressed in the Pre-trial Order.” Id.<sup>6</sup> However, “[n]o specific prayer for  
11 . . . punitive damages is needed.” Cancellier v. Federated Dep’t Stores, Inc., 672 F.2d 1312,  
12 1319 (9th Cir. 1982). Bonner drops his “failure to plead” argument in his reply brief. Reply,  
13 docket no. 363, at 10 (“Even overlooking the flaws in his pleading . . .”).

14 Here, there was no lack of adequate notice of punitive damages. Eklund alleged  
15 “knowing violations” and “wrongful motives,” and when he moved to amend his complaint  
16 to allege “malice,” the Court denied the motion because the proposed amendments were  
17 redundant of prior allegations. Furthermore, in May 2008, Eklund explicitly provided notice  
18 that he would be seeking punitive damages. Stockmeyer Decl., Ex. B (Pl.’s First Suppl.  
19 Initial Disclosures) at 4 (“Mr. Eklund also claims . . . punitive damages under 42 U.S.C.  
20 § 1983” in the hundreds of thousands of dollars). Eklund again provided notice of punitive  
21 damages in January 2009. Id., Ex. C (Pl.’s Second Suppl. Initial Disclosures) at 4 (“This  
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23 <sup>5</sup> In each complaint, Eklund plead “[f]or such other relief as the Court may deem equitable and  
24 proper,” which arguably could cover punitive damages available under Section 1983. Compl.  
at 7; First Am. Compl. at 9; Second Am. Compl. at 9.

25 <sup>6</sup> The Hammond Court also denied punitive damages because punitive damages were not  
26 available against the county as a governmental entity, and the appellants failed to sue any  
officials whose conduct could give rise to a claim for punitive damages. 859 F.2d at 803 n.2.  
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1 [computation of economic loss] is exclusive of . . . punitive damages . . .”). The Court  
2 denies Bonner’s motion to vacate the punitive damages award based on Eklund’s failure to  
3 plead for such damages.

4 (b) Substantial Evidence Argument

5 Bonner next argues that Eklund’s punitive damages award should be overturned  
6 because Eklund failed to meet a heightened punitive damages standard. See Ngo v. Reno  
7 Hilton Resort Corp., 140 F.3d 1299, 1303-04 n.6 (9th Cir. 1998). Bonner does not contend  
8 that Instruction No. 18 did not direct the jury to meet a “heightened” punitive damages  
9 standard. See Instruction No. 18 (directing an award of punitive damages if “defendant’s  
10 conduct that harmed plaintiff was malicious, oppressive, or in reckless disregard of the  
11 plaintiff’s rights”). Rather, Bonner argues that there was insufficient evidence presented at  
12 trial for a jury to find that Bonner’s failure to recuse was “malicious, oppressive, or in  
13 reckless disregard of plaintiff’s rights.”

14 In support of the punitive damages award, Eklund relies heavily on Bonner’s  
15 testimony that Bonner fired Eklund on a “hunch:”

16 Q: Did you hear Mr. Eklund’s testimony that he was unaware that  
17 Mr. Mack was extending his due dates?

18 A: I heard it, but I could not believe he said that.

19 Q: Do you have any reason to believe that he did know?

20 A: Yes. I have reason to believe he did know.

21 Q: Did someone testify to that?

22 A: No.

23 Q: Have you seen a document that says that?

24 A: No.

25 Q: An original document?

26 A: No.

1 Q: Is there any indication on the MCIS system that says that?

2 A: No.

3 Q: It's just a hunch?

4 A: Say again.

5 Q: Is it just a hunch?

6 A: It's just a hunch.

7 Id., Ex. A (VRP) at 661:5-21. Defendants dispute Eklund's characterization of Bonner's  
8 "hunch" testimony. Defs.' Reply at 6 n.3. Bonner's hunch remark at trial was inartful but by  
9 itself fails to rise to the level of malice. The reports provided to Bonner summarizing the  
10 ticket-fixing investigation constituted overwhelming evidence of employee misconduct.

11 However, having searched the record, the Court concludes that there is sufficient  
12 evidence for the jury to find Bonner's conduct malicious, oppressive or reckless. The July  
13 12, 2004 letter to Judge Bonner, transmitting a written Memorandum (Exhibit 74) alleged  
14 that Judge Bonner had two conflicting roles: "in one sense bringing allegations for Bruce to  
15 defend and then simultaneously acting as an impartial hearing officer." The letter expressly  
16 requested another impartial hearing officer. Judge Bonner viewed the letter as a "thinly  
17 veiled threat." See Resp. to Allegations, dated July 29, 2004 (Exhibit 84). Notwithstanding  
18 the perceived threat, Judge Bonner proceeded to act as the final decision- maker and  
19 thereafter terminated Plaintiff's employment. The evidence at trial was sufficient to support  
20 a finding of bias and a personal stake of Judge Bonner in the resolution of the Plaintiff's  
21 allegations. The evidence, although weak, also supports a finding by the jury of malice or  
22 the deliberate or knowing violation of Plaintiff's rights to an unbiased decision- maker. The  
23 jury is presumed to have followed the Court's Instruction No. 18 setting forth the basis for  
24 any award of punitive damages. See Kennedy v. Lockyer, 379 F.3d. 1041, 1061 n.3 (9th Cir.  
25 2004). The Court denies Bonner's motion to vacate the award of punitive damages.

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